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Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1997

ROBERT A. BOURGEOIS,

*Petitioner,*

v.

AVONDALE SHIPYARDS, INC.,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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47 pp

## QUESTIONS PRESENTED FOR REVIEW

I.

Was the decision of the United States Court of Appeals, Fifth Circuit, correct in holding that the employer's credit under 33 U.S.C. Section 933 (f) included prejudgment interest as well as principal recovery?

II.

Was the decision of the United States Court of Appeals, Fifth Circuit, correct in holding that under the facts of this case the employer was not subject to penalties under 33 U.S.C. Section 914 (e), where weekly compensation payments of $153.27 were made and employer admitted that the correct amount of weekly compensation payments should have been $410.53 and also where employer unilaterally and without any authority terminated all compensation payments and medical benefits over two years before recovery was made on action against third party?

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## OPINION BELOW

The opinion of the Administrative Law Judge dated April 7, 1994 is reprinted at Appendix A-8.

The notice from the Clerk of the Benefits Review Board dated September 12, 1996, stating that because this case had been pending before the Benefits Review Board for over a year, under Public Law 104-134 enacted on April 26, 1996, the decision pending for review is considered affirmed and final for purposes of obtaining review in the United States Court of Appeals. The notice is reprinted at Appendix A-34.

The decision of the United States Court of Appeals, Fifth Circuit, dated September 9, 1997, is reprinted at Appendix A-1. This case is cited as 121 F.3d 219.

The denial of the United States Court of Appeals, Fifth Circuit, of Petition for Rehearing dated November 25, 1997, is reprinted at Appendix A-33.

## JURISDICTION

The decision of the United States Court of Appeals, Fifth Circuit, denying the petitioner's timely Motion for Rehearing is dated November 25, 1997. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254.

## STATUTES INVOLVED

33 U.S.C. Section 933(f) provides:

> (f) Institution of proceedings by person entitled to compensation. If the person entitled to compensation institutes proceedings within the period prescribed in section 33(b) [subsec. (b) of this section] the employer shall be required to pay as compensation under this Act, a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees).

33 U.S.C. Section 914(e) provides:

> Additional compensation for overdue installment payments payable without award. If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 percentum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subdivision (d) of this section, or unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

Louisiana Revised Statute 40:1299.42 B. provides:

> The total amount recoverable for all malpractice claims for injuries to or death of a patient, exclusive of future medical care and related benefits as provided in R.S. 40:1299.43, shall not exceed five hundred thousand dollars plus interest and cost.

Louisiana Revised Statute 13:4203 provides:

> Legal interest shall attach from date of judicial demand, on all judgments, sounding in damages, "ex delicto", which may be rendered by any of the courts.

## STATEMENT OF THE CASE

The facts of this case are not disputed.

On May 13, 1973, Robert A. Bourgeois, petitioner, was employed at Avondale Shipyards, Inc. when he fell into a barge fracturing his left wrist. At that time, he was earning $229.90 per week and was paid a weekly Longshoremen's and Harbor Workers' Compensation Act benefit of $153.27 for work he missed (one week). Bourgeois returned to work shortly after the incident and worked continuously for ten years until May of 1983 when he was diagnosed with a bone cyst at the site of the previous fracture.

On May 17, 1983, Dr. Gordon McFarland performed surgery on Bourgeois to repair the cyst of his wrist. During the operation, McFarland injured the left lateral femoral nerve, causing a disabling injury to Bourgeois. Avondale voluntarily began paying benefits to Bourgeois

at $153.27 a week. This rate was based on Bourgeois' earnings at the time of the original accident in 1973. These benefits were paid from May 17, 1983, to March 15, 1988, when they were unilaterally terminated. Medical benefits were also terminated at the same time.

Bourgeois complained throughout this period that his rate of compensation should have been based on his earnings as of the date of disability (May 1983) and not the date of the original accident (May 1973). *Johnson v. Director, Office of Workers Compensation, et al.*, 911 F.2d 247 (9th Cir. 1990) writs denied by the United States Supreme Court, 111 S. Ct. 1582.

This eventually resulted in the filing of an official claim in 1988 to have his benefits raised to the correct level of earnings. Originally, this claim was filed solely because Avondale was allegedly not paying compensation at the proper rate.

Soon after May, 1983, Bourgeois instituted a malpractice proceeding against his doctor. Avondale intervened in these proceedings.

Bourgeois was eventually awarded the maximum amount allowed under the laws of Louisiana in malpractice cases of $500.000.00 plus certain medical expenses, with legal interest from date of judicial demand. The Louisiana Statute provides for legal interest in a case of this type from date of judicial demand until paid. Recovery was finally received by Bourgeois on July 18, 1990. Avondale's claim for reimbursement of all compensation paid and all medical expenses paid was recognized, including legal interest on those amounts.

Questions remained as to the amount of credit Avondale was entitled to receive as a result of Bourgeois' recovery in the malpractice suit. When the issues were not satisfactorily concluded by the District Director, Bourgeois sought a formal hearing from Administrative Law Judge C. Richard Avery to resolve the various issues. These issues centered around whether: (1) Bourgeois' compensation rate should have been based on his average weekly wage at the time his disability began in 1983 rather than the wages he was earning at the time he originally suffered his wrist injury in 1973. The difference would be $153.27 per week if the 1973 date was used or $410.53 per week if the 1983 date was used; (2) was Bourgeois entitled to penalties pursuant to Section 914(e) and (f) due to Avondale's unilateral termination of his compensation benefits and medical expenses in March, 1988; and (3) Avondale's credit pursuant to Section 933(f) should have been limited to the actual damages awarded to Bourgeois and should not have included the legal interest which was added as a result of having to wait to receive the money from his malpractice case.

After the hearing before the Administrative Law Judge, Avondale agreed in its Brief that in truth and in fact the compensation rate should have been based upon the earnings at the time of the disability of $615.77 and that the weekly compensation should have been $410.53.

This issue was judicially settled in *Johnson v. Director, Office of Workers Compensation, et al.*, 911 F.2d 247 (9th Cir. 1990) writs denied by the United States Supreme Court, 111 S. Ct. 1582.

Judge Avery ultimately found that Bourgeois should have been compensated at a rate based on his salary from the time of his disability in 1983 and that his earnings in 1983 averaged $615.77. He also concluded that Bourgeois' net recovery and the amount of Avondale's credit was $533,051.00, an amount which included pre-judgment interest; and held that penalties would not be assessed against Avondale.

Although the case was appealed to the Benefits Review Board on April 26, 1994, by notice dated September 12, 1996, petitioner was advised:

> "According to our records, the appeal in the instant case has now been pending at the Benefits Review Board for more than one year. Therefore, consistent with Public Law 104-134, this decision pending review by the Benefits Review Board is considered affirmed and shall be considered the final order of the Board for purposes of obtaining review in the United States courts of appeal."

Therefore, although this matter was filed and considered pursuant to administrative proceedings, these proceedings were never completed and the Benefits Review Board never had an opportunity to consider the case on the merits.

The United States Court of Appeals, Fifth Circuit, affirmed the decision of the Administrative Law Judge, denied rehearing and it is from this judgment that petitioner applies for a Writ of Certiorari.

## REASONS FOR GRANTING THIS WRIT

Petitioner urges this Court to grant certiorari to determine if the United States Court of Appeals, Fifth Circuit, has decided important questions of Federal law that have not been, but should be settled by this Court.

The history of this particular case through the judicial process has resulted in petitioner's rights not being properly considered as contemplated in the administrative process. This results from the fact that the Benefits Review Board never had the opportunity to consider these issues. Because of the large backlog of undecided cases pending before the Benefits Review Board, Congress adopted Public Law 104-134, which legislatively provided that the decision of the Administrative Law Judge would be considered affirmed and the matter subject to appeal to the United States Court of Appeals. Therefore, the provisions of the Longshoremen's and Harbor Workers' Compensation Act providing for the administrative disposition of the issues by experts in the field were not available to petitioner.

These issues are particularly important and should be scrutinized by this Court. These are issues that have never been judicially decided before and the decision of the Court of Appeals, Fifth Circuit, adversely affects petitioner's rights, who was the injured employee.

If this decision is allowed to remain, it shall become the initial authority which will adversely affect other employees, whose rights are to be determined under the Longshoremen's and Harbor Workers' Compensation Act.

## I. THE DECISION OF THE FIFTH CIRCUIT IN THIS CASE IS INCORRECT IN HOLDING THAT THE EMPLOYER'S CREDIT UNDER 33 U.S.C. SECTION 933(f) SHOULD INCLUDE PREJUDGMENT INTEREST AS WELL AS PRINCIPAL RECOVERY.

Where an employee, such as petitioner, is entitled to compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act, but is also entitled to recover damages from a third person as was done in this case, then under Section 933(f) the employer " . . . shall be required to pay as compensation under this Act, a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including attorneys' fees)."

The amount of this credit is the primary issue in dispute in this case.

Petitioner recovered $500,000.00 and after the payment of expenses and attorney fees received the net amount of $307,589.84 plus legal interest for the period from judicial demand until payment was made. Actually, including the legal interest, petitioner received $533,051.00. The employee claims that the credit for future compensation resulting from the third party recovery should include only the principal recovery. The employer claims that the credit should include every penny actually received by the employee, including the

prejudgment interest. The employee claims that the prejudgment interest is not an item of recovery, but it is payment for having to wait over six years before receiving his money.

Petitioner claims that the Court was in error in allowing credit for the prejudgment interest.

The Louisiana Medical Malpractice statute provides a ceiling of $500,000.00 for a medical malpractice claim. Louisiana revised Statute 40:1299.42 B. (1), which reads:

> "The total amount recoverable for all malpractice claims for injuries to or death of a patient, exclusive of future medical care and related benefits as provided in R.S. 40:1299.43, shall not exceed five hundred thousand dollars plus interest and cost."

(There was recovery for medical expenses which are unrelated to the issues of this case. Employer had paid medical expenses to employee in the amount of $58,027.43. Employer was repaid this entire amount together with prejudgment interest.)

In the Louisiana Appellant Court decision, employee's damages in the amount of $500,000.00 was recognized, subject to the reimbursement of the employer for the $34,047.84 in compensation that it had paid. *Bourgeois v. Ochsner Foundation Hosp.*, 550 So.2d 1229 (La. App. 5 Cir. 1989). (see Appendix A-36.)

Under the laws of the State of Louisiana in a case of this kind, the successful plaintiff is entitled to legal interest on the recovery from date of judicial demand. The rate

of interest is also fixed by statute. This interest is designated as legal or judicial interest. The authority is embodied in Louisiana Revised Statute 13:4203 which reads:

> "Legal interest shall attach from date of judicial demand, on all judgments, sounding in damages, "ex delicto", which may be rendered by any of the courts."

Louisiana Civil Code Article 2924 fixes the manner in which rates of legal or judicial interest are determined.

Stated another way, if a reasonable third party defendant had paid employee the amount of his claim in the malpractice suit on the day of judicial demand (the date the claim was filed with the Medical Review Panel or May 15, 1984) then the amount due would have been $500,000.00 of which sum employer would have received reimbursement of the $34,047.84 that it had paid in compensation. Employee's attorney would have received a fee of $155,317.38, deducted the expenses of $3,044.94, and the net recovery to petitioner would have been $307,589.84.

This would have been the amount of credit to be applied toward future compensation. Simple, no problem, no dispute, all fair.

The truth of the matter, however, is that employee did not receive his recovery on May 15, 1984. The litigation was strongly defended. The employer participated in the case and it was not until July 18, 1990, that the money was received.

Employee had to wait more than six years and two months before receiving the recovery.

Because of this long delay and wait, when eventually the money was received, under the statute that we have cited above, legal interest was also due and collected.

The obvious question to be considered by the Court is *"should employer benefit dollarwise because employee was required to wait over six years to receive his money?"* It simply is not fair and it is not right.

Legal interest and the reimbursement for medical expenses paid by employee should not form part of the credit that employer is entitled to receive. The United States Supreme Court in *West Virginia v. United States,* 479 U.S. 305, 93 L. Ed. 2d 639, 107 S. Ct. 702 (1987), in characterizing prejudgment interest stated in footnote 2 (*Id.*):

> "Prejudgment interest serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress. See Comment, Prejudgment Interest: Survey and Suggestion, 77 N.W. U.L. Rev. 192 (1982)."

In considering the character of prejudgment interest, the Court's attention is directed to the case of *Louisiana & Arkansas Railway Co. v. Export Drum Co.,* 359 F.2d 311 (1966 5th Cir. U.S. Court of Appeals). In another context the Court was considering questions relating to prejudgment interest and observed:

> "We believe that prejudgment interest should be allowed. In this case, a sum certain is in controversy. As the common law recognizes in analogous situations, the *only way the wronged party*

> *can be made whole is to award him interest from the time he should have received the money.*
>
> At the conclusion of the dispute, the parties should be in the same position regardless of whether the shipper does not pay the disputed amount, as here, and the carrier is forced to sue, or whether the shipper pays and then sues for an overcharge."
>
> (emphasis added)

In considering prejudgment interest in *General Motors Corporation v. Devex Corporation, et al.*, 461 U.S. 648, 76 L. Ed. 2d 211, 103 S. Ct. 2058 (1983), the Court states:

> " . . . An award of interest from the time that the royalty payments would have been received merely serves to make the patent owner whole, since his damages consist not only of the value of the royalty payments but *also of the forgone use of the money between the time of infringement and the date of the judgment.*" (emphasis added)

The author in the article entitled "Prejudgment Interest: Survey and Suggestion", Northwestern University Law Review, Volume 77, Page 192 (1982), makes useful observations which relate to this problem. The author states:

> *"If a judgment, years after the fact, provides only the amount of damage sustained by the claimant at the time of the incident, the claimant will have lost the opportunity to invest the amount of the damages and to earn a return on that investment. His compensation will not be complete, for he has not recovered damages for the opportunity costs incurred between the time of injury and the time of judgment. . . .*

> *If the defendant retains the amount which represents the use of the money damages, he is unjustly enriched to the extent that the money has earned a rate of return for his benefit during the pendency of the litigation. The loss of use to the plaintiff is identical to the extent of unjust enrichment of the defendant."* (emphasis added)

Therefore, the obvious difference in the principal damage recovery and the allowance of legal interest on this amount is apparent. The interest does not amount to damages recovered. The interest only represents what the plaintiff would have received on these funds if he had been paid when they were due.

In conclusion, petitioner strongly urges the Court to grant a Writ of Certiorari to consider this important issue, which has never been judicially considered before. The award of legal interest in this case was granted solely because employee was required to wait over six years before receiving his money and the employer should not benefit because of employee's misfortune.

## II. THE FIFTH CIRCUIT'S OPINION DENYING THE PENALTIES UNDER SECTION 914(e) IS INCORRECT. THIS QUESTION OF FEDERAL LAW HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT AS IT AFFECTS THE RIGHTS OF ALL EMPLOYEES FALLING UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT. THE PENALTY PROVISIONS OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT ARE TO PROTECT THE RIGHTS OF AN INJURED EMPLOYEE WHO CERTAINLY IS NOT ON AN EQUAL ECONOMIC BARGAINING POSITION WITH THE EMPLOYER.

Without penalty provisions an injured employee is at the mercy of the employer who refuses to recognize his obligation under the Act. In situations such as this one, an employer can arbitrarily pay compensation at any rate whether it is correct or not and can terminate the payments at any time whether it is justified or not and would have nothing to lose by taking the chance.

In this case employer persisted in paying employee at a rate which was a small fraction of what it should have been and then admitting the incorrectness of this contention and admitting that the compensation should have been $410.53 instead of $153.27, which was actually paid. The conduct of the employer toward petitioner became even more aggravated on March 15, 1988, when all compensation benefits, including medical benefits, were arbitrarily terminated. After that date, no compensation or medical expenses were paid and petitioner remained totally disabled.

Although employer terminated petitioner's benefits under the Act on March 15, 1988, the malpractice litigation was not final. As a matter of fact, the jury did not return its verdict until September 15, 1988, which was adverse to petitioner. This was later reversed on appeal. It was not until July 18, 1990, before any recovery was made in the third party litigation.

Without penalties an employer who places his employee in such a position as this one, would have absolutely nothing to lose. It might even gain by his contentions. The only remedy that an employee has to motivate his employer to do what is right and to pay according to the law is the application of penalties in such a case as this.

Of course, not only did employer fail to pay at the rate it should have paid and then admit that it was wrong, but over two years before recovery in the third party suit, employer arbitrarily and without any reasonable ground, terminated all payments and all medical benefits. The only remedy against such an employer is the imposition of penalties.

Without penalties an employer, such as this one, will go merrily on with his improper acts toward its employee and then if he is caught, simply pay up. It will glow in the philosophy of "nothing ventured, nothing gained".

Employee shows that this is an extremely aggravated case of improper treatment of an employee by employer.

## CONCLUSION

For all of the reasons stated above, petitioner requests this Court issue a writ of certiorari.

Respectfully submitted,

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# APPENDICES

## APPENDICES

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BOURGEOIS V. OCHSNER FOUNDATION HOSPITAL, 550 So. 2d 1229 (La. App. 5th Cir. 1989) .. A-36

**Robert A. BOURGEOIS, Petitioner,**

**v.**

**AVONDALE SHIPYARDS, INC., Director, Office of Worker's Compensation Programs, U.S. Department of Labor, Respondents.**

**No. 96-60608.**

United States Court of Appeals,
Fifth Circuit.

Sept. 9, 1997.

Petition for Review of an Order of the Benefits Review Board.

Before REYNALDO G. GARZA, HIGGINBOTHAM and DAVIS, Circuit Judges.

REYNALDO G. GARZA, Circuit Judge:

*Background*

On May 13, 1973, Robert A. Bourgeois ("Bourgeois"), appellant, was employed at Avondale Shipyards, Inc. ("Avondale") when he fell into a barge and, among other things, broke his left wrist. At that time, he was earning $229.90 per week and was paid a weekly Longshoremen's and Harbor Workers' Compensation Act ("LHWCA")[1] benefit of $153.27 for work he missed. Bourgeois returned to work shortly after the incident and worked continuously for ten years until May of 1983 when he was diagnosed with a bone cyst at the site where it was previously injured.

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[1] 33 U.S.C. § 901, *et seq.* (1986).

On May 17, 1983, Dr. Gordon McFarland performed surgery on Bourgeois to remove the cyst on his wrist. During the operation, McFarland severed the left lateral femoral nerve, causing a disabling injury to Bourgeois. Avondale voluntarily began paying benefits to Bourgeois. However, he was paid $153.27 a week, a rate based on Bourgeois' earnings at the time of the original accident in 1973. These benefits were paid from May 17, 1983 to March 15, 1988.

Bourgeois complained throughout this period of compensation, claiming that his rate of compensation should have been based on the earnings as of the date of disability (May 1983) and not the date of injury (May 1973). This eventually resulted in the filing of an official claim in 1988 to have his benefits raised to the level of earnings at the time of disability. Originally, this claim was filed because Avondale was allegedly not paying compensation at the proper rate. However, Bourgeois instituted negligence proceedings against his doctor. This raised other issues which were ultimately added to this case.

In the midst of Bourgeois' dispute with Avondale over the rate of compensation, Bourgeois filed a medical malpractice suit against Dr. McFarland on November 27, 1985. Bourgeois was eventually awarded $762,811.00 in that lawsuit and in 1990 received $533,051.00, exclusive of attorneys' fees and expenses.

Bourgeois subsequently sought a formal hearing from Administrative Law Judge C. Richard Avery to resolve the various issues involved [sic] the proceedings brought against Avondale. These issues centered around

whether: (1) Bourgeois' compensation rate should have been based on his average weekly wage at the time his disability began in 1983 rather than the wages he was earning at the time he originally suffered his wrist injury in 1973; (2) he was entitled to penalties pursuant to § 14(e) and (f) due to Avondale's arbitrary and capricious termination of his benefits in March, 1988; and (3) Avondale's credit pursuant to § 33(f) should have been limited to the actual damages awarded to Bourgeois and should not have included the legal interest which was added as a result of having to wait to receive the money from his malpractice case.

Judge Avery ultimately found that Bourgeois should have been compensated at a rate based on his salary from the time of his disability and that this rate should be $615.77.[2] He also concluded that Bourgeois' net recovery and the amount of Avondale's credit was $533,051.00, an amount which included pre-judgment interest. Finally, he held that penalties pursuant to 33 U.S.C. § 914(f) and (e) would not be assessed against Avondale. In a Supplemental Decision and Order rendered on November 4, 1994, Judge Avery awarded Bourgeois' attorney fees in the amount of $3,750.00 plus expenses totaling $274.38.

Bourgeois appeals this decision from the Administrative Law Judge.

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[2] Judge Avery presents two different figures in his order regarding average weekly salary. One amount is $615.77 and the other is $614.37. The correct amount is $615.77. Accordingly, this is the figure upon which we will base our conclusions.

*Discussion*

I. Average Weekly Salary

Bourgeois argues that *Johnson v. Director, Office of Workers Compensation Programs,* 911 F.2d 247 (9th Cir. 1990), supports his argument that his weekly wage for the purposes of benefits should be $664.80 and not $615.77. The court in *Johnson* states that compensation should be calculated at the time of disability, not the time of injury. Avondale has already conceded this point. Bourgeois' figure represents the average weekly wage he earned in 1982 based on his 1982 W-2 Form. The Administrative Law Judge's figure represents the average weekly wage earned in the fifty-two weeks prior to his disability of May 17, 1983.

The lower court's method of calculating compensation "at the time of disability" under § 910 of the LHWCA is a fair and reasonable method of determining compensation which we will not disturb on appeal.

II. Credit

The LHWCA provides that an employer who has paid benefits to an employee who later recovers for his injuries from a third party shall receive a credit for the "net amount" recovered against that third party. The statute states that the net amount:

> shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees).

33 U.S.C. § 933(f).

In *Jacques v. Kalmar Industries, AB*, 8 F.3d 272 (5th Cir. 1993), we held that the employer's credit attaches to the "total recovery obtained by the injured workman from a third-party defendant, regardless of what that recovery replaces or is termed by the court." *Id.* at 274. Although we interpreted "net amount" to include punitive damages in *Jacques*, we cannot distinguish punitives from prejudgment interest for purposes of "net amount."

Bourgeois argues that it would be unfair to include prejudgment interest in the amount credited to the employer because that amount represents compensation for the amount of time the employee had to wait before receiving payment. However, the law of this Circuit as well as the statute control. As such, the Administrative Law Judge's finding that Avondale was entitled to a credit for the full amount of Bourgeois' net recovery, including pre-judgment interest, is proper.

Applying the $615.77 average weekly wage (and corresponding compensation rate of $410.53 calculated under the LHWCA), Avondale's credit will not amortize until the year 2008.[3]

III. Penalties

Bourgeois claims that the Administrative Law Judge erred in failing to award penalties under either 33 U.S.C.

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[3] This is calculated by multiplying the weekly compensation rate or $410.53 by fifty-two weeks to obtain an annual compensation of $21,347.56. Dividing the credit amount of $533,051.00 by this annual compensation reveals a credit for almost twenty-five years.

§ 914(e) or (f) for Avondale's termination of his benefits on March 15, 1988 and for paying Bourgeois at a compensation rate based on his 1973 wages. Section 914(f) provides:

> If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 percent thereof . . .

Avondale correctly argues that § 914(f) provides penalties only if an *award* is not paid in a timely manner. There was no award in this case as Avondale voluntarily paid benefits to Bourgeois.

Bourgeois alternatively argues that penalties should be assessed under § 914(e). This section provides:

> If any installment of compensation payable without an award is not paid within fourteen days after it becomes due . . . there shall be added to such unpaid installment an amount equal to 10 percentum thereof . . . unless notice is filed under subdivision (d) of this section . . .

Subdivision (d) provides:

> If the employer controverts the right to compensation he shall file with the deputy commissioner on or before the fourteenth day after he has knowledge of the alleged injury or death, a notice . . . stating that the right to compensation is controverted . . .

Avondale filed its Notice of Controversion on March 11, 1988, and made its last payment on March 16, 1988. There is also no basis for assessing a penalty under § 914(e).

Accordingly, Sections 914(e) and (f) are not applicable to the present case.

IV. Attorneys' fees

Given our decision in *Ingalls Shipbuilding, Inc. v. Director, OWCP,* 991 F.2d 163 (5th Cir. 1993), we find that the Administrative Law Judge did not err in reducing all expenses as well as attorneys' fees in its supplemental decision and order.

*Conclusion*

Based on the foregoing, we accordingly AFFIRM the findings of fact and conclusions of law as submitted by the lower court.

**U.S. Department of Labor** **[SEAL]**

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| IN THE MATTER OF<br>ROBERT A. BOURGEOIS<br>Claimant<br>v.<br>AVONDALE SHIPYARDS, INC.<br>Employer | CASE NO.<br>93-LHC-0920<br>OWCP NO.<br>7-024532 |

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BEFORE: C. RICHARD AVERY
Administrative Law Judge

## DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, (The Act), brought by Robert A. Bourgeois, (Claimant) against his former employer, Avondale Shipyards, Inc. (Employer). The formal hearing was conducted at Metairie, Louisiana on December 10, 1993, at which time the parties were represented by counsel and afforded the opportunity to present documentary evidence, examine and cross-examine witnesses, and make oral arguments. Claimant submitted thirty-five exhibits, all of which were admitted except Nos. 25 & 31. Twenty-one Employer's exhibits and one Joint Exhibit were admitted into evidence.[1] This decision is based on the entire record.

### Stipulations

Prior to the hearing, the parties prepared joint stipulations of facts and issues, which were submitted as follows:

1. Claimant originally injured his wrist on May 13, 1973, but first suffered a disability on May 17, 1983;

2. An employer/employee relationship existed at the time of the accident;

3. Employer was immediately advised of the injury on May 17, 1983;

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[1] The following abbreviations will be used throughout this decision when citing evidence of record: Claimant's Exhibit – "CX," Employer's Exhibit – "EX," Director's Exhibit – "DX," Transcript of the hearing – "Tr.," and Joint Exhibit – "JX."

4. Employer filed Notice of Controversion on February 9, 1988;

5. An informal conference was held on October 22, 1992;

6. Employer paid benefits to Claimant for a temporary total disability from March 16, 1983, through March 15, 1988, for a total of $34,047.84;

7. Medical benefits have been paid in the amount of $58,027.43; and

8. Claimant reached maximum medical improvement in November, 1993. (JX-1).

## Background

Claimant originally suffered an injury to his left wrist in May, 1973. At that time, he sought medical treatment, was unable to work for a brief time, and eventually returned to his former position with no further incident until 1983. The parties agree that no benefits are due for any time before 1983.

In May, 1983, Claimant sought medical treatment from Dr. Gordon McFarland for pain he was suffering in his left wrist. Upon examination, Dr. McFarland noted that Claimant had developed a cyst on his wrist at the site where it had been broken in 1973. Dr. McFarland recommended surgery to remove the cyst and repair the bone.

Employer voluntarily began paying benefits either in the form of salary continuation or workers' compensation as follows:

| | |
|---|---|
| salary | March 16, 1983 – July 19, 1983 |
| comp. | July 20, 1983 – February 20, 1984 |
| salary | March 23, 1984 – June 25, 1986 |
| comp. | June 26, 1984 – September 4, 1984 |
| comp. | October 3, 1984 – March 15, 1988 |

Claimant apparently attempted to return to work on at least one occasion in the fall of 1984.

On May 17, 1983, Dr. McFarland performed a cyst-removal surgery which included harvesting bone from Claimant's iliac crest to be grafted to the wrist fracture site. During the surgery, Dr. McFarland severed Claimant's left lateral femoral nerve.

Claimant filed a medical malpractice suit against Dr. McFarland on November 27, 1985. Employer intervened in this action and remained a participant until the final determination of the matter.

On February 9, 1988, Claimant filed a claim under the Act contending that Employer had arbitrarily terminated his benefits and that he had been paid a compensation rate that was based on an erroneous average weekly wage calculation. (CX-3). On March 15, 1988, Employer terminated Claimant's compensation and medical benefits. (CX-5).

On September 26, 1988, the trial court returned a verdict in favor of Dr. McFarland. (CX-12). Claimant appealed to the Fifth Circuit Court of Appeals for Louisiana. (CX-13). On September 14, 1989, that Court reversed and remanded the lower court's finding and entered a

judgment in favor of Claimant awarding $500,000 in damages, representing:

> $491,214 in lost past and future wages, subject to reimbursement of $34,047.84 to Avondale, and the remainder of $8786 for pain and suffering; we further award medical expenses, beginning with the date of malpractice, May 17, 1983, until date of judgment, September 26, 1988, subject to reimbursement to Avondale, plus future medical expenses of $10,000; we further award interest on the judgment from date of judicial demand, all costs of these proceedings and those below, plus fees of expert witnesses who testified for plaintiff. (CX-13).

On July 18, 1990, a judgment was entered by the trial court awarding Claimant and his attorney $762,811.00 "in satisfaction of the Judgment of the Fifth Circuit Court of Appeal rendered on September 14, 1989, and all of the plaintiff's claims for costs and medical expenses and the interest associated with those costs and medical expenses. This amount includes the $10,000.00 in future medical expenses awarded by the Fifth Circuit Court of Appeal." Additionally, the July 18, 1990 judgment provided that Employer was to be reimbursed in the amount of $90,737.00, an amount which the parties agreed represented the compensation and medical benefits Employer had paid Claimant to that date. (CX-18).

On July 18, 1990, Claimant received a check for $533,051.00, a net amount which he admitted at trial did not include attorney's fees. (EX-13).

On November 12, 1991, Claimant and the Louisiana Patient's Compensation Fund ("LPCF") entered a Consent Judgment whereby the LPCF paid Claimant $25,882.89, an amount representing medical expenses and interest, for medical expenses arising before May 7, 1991. That Consent Judgment further ordered that Claimant was entitled to "full medical care and related benefits as provided in Louisiana Revised Statute 40:1299.43" and that the LPCF should make payments from time to time according to the terms of this statute for all medical care and related benefits that he might incur after May 7, 1991. (CX-24).

Claimant continued to pursue his Longshore claim. At this point, Employer contended that due to Claimant's third party settlement it was due a credit of $533,051.00 and that such a credit would not amortize until some future date which far exceeds Claimant's life expectancy.

On August 14, 1990, Employer filed its Notice of Final Payment of Compensation, reflecting that Employer made its last compensation payment on March 15, 1988, and thereafter ceased payments because it was taking a credit for Claimant's third-party judgment.[2]

An informal conference was held on October 22, 1992. Apparently, the only issues raised pertained to average weekly wage and to the Section 33(f) credit.

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[2] Employer apparently had completed a Notice of Final Payment of Compensation on March 11, 1988 although there is no indication this document was ever filed. (CX-34). The reason for termination of payments was listed as "Claimant has been released to PTW. Employment has been offered. Claimant rated for PP. Employer has offered the PP disability payment."

(EX-6). As a result of the informal conference, the District Director concluded that Claimant's compensation rate should be based on his 1973 wages, Employer was entitled to a credit for Claimant's net recovery of $533,051.00, and thus no further benefits were owed to Claimant. Further, the District Director noted that Employer's credit would not amortize until approximately the year 2055.

Subsequently an appeal was taken to the OALJ, and on December 10, 1993, the parties attended a formal hearing. At that time, Claimant raised only three issues. First, Claimant contends that his compensation rate should be based on his average weekly wage at the time his disability began in 1983, rather than the wages he was earning at the time he originally suffered his wrist injury in 1973. Secondly, Claimant argues that he is entitled to penalties pursuant to Section 14(f), due to Employer's arbitrary and capricious termination of benefits in March, 1988. Thirdly, Claimant urges that Employer's credit pursuant to Section 33(f) should be limited to the actual damages award Claimant received and should not include the legal interest which was added as a result of his having to wait to receive the money from his malpractice case.[3]

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[3] At the hearing, I expressed concern as to whether I have proper jurisdiction over Claimant's last two issues in that they appear to contain only questions of law and any dissatisfaction the parties may have had with the District Director's decision following the informal conference should have been appealed directly to the Board. I specifically asked the parties to cite the authority by which they contend I have jurisdiction over these matters and they urged the precedants of *Lukman v. Director, OWCP*, 896 F.2d 1248 (10th Cir. 1990) and *Mansfield v. Director, OWCP*, 8 BLR 1-445 (1986). Thus, all of Claimant's issues are discussed in the body of this decision.

## Findings of Fact

Claimant, Robert A. Bourgeois, is 57 years old and has a high school education. (Tr. at 41). He spent three years in the Navy and two years in the Coast Guard. Claimant stated that during his military service he received training in cargo handling, Aids to Navigation and Aviation Mechanics. (Tr. at 75). Claimant has also had some training in diesel mechanics from Jefferson Parish Trade School. Claimant's work history includes a time he worked for an offshore surveying company as an operator, "putting together tools, logging welds, [and] running machinery." Claimant was hired by Employer in March, 1966 as a rigger helper and continued his employment with Employer until May 1983. Claimant testified that he is right handed. (Tr. at 79).

On May 17, 1973, Claimant fell into a barge at work and broke his left hand/wrist. Claimant was paid compensation for approximately one week. (Tr. at 47, EX-5). Apparently, the nature of Claimant's injury was not immediately recognized and Claimant continued to work. He testified that it was until some time later that he was x-rayed and put in a cast for the broken wrist.

Claimant continued working for employer until approximately May, 1983. At that time, he was a derrick captain and crane foreman and stated that he "began having problems" with his left hand. Upon seeking medical treatment, Claimant learned he had developed a cyst on his wrist. Claimant came under the care of Dr. Gordon McFarland at Ochsner Clinic who suggested Claimant undergo a bone graft. (Tr. at 55).

On May 17, 1983, Claimant underwent a bone graft performed by Dr. McFarland. Following that surgery Claimant developed pain in his left thigh. In January, 1984, Dr. Kline performed surgery on Claimant's thigh, transecting part of Claimant's lateral femoral cutaneous nerve. (Tr. at 58-59). Claimant filed a malpractice suit against Dr. McFarland and eventually won. He received a net check for $533,051.00 on July 18, 1990. (Tr. at 63).

Claimant eventually tried to return to work on two occasions, once approximately in September 1984, but was unable to remain on the job due to pain. (Tr. at 99). Claimant stated that Employer suspended his compensation payments on March 15, 1988. (Tr. at 66).

On March 3, 1988, Employer notified Claimant that he had an appointment to be examined by the company physician for an examination to determine whether he was fit to return to work in Employer's Restricted Work Release Program (RWRP). (EX-14). On March 17, 1988, Employer notified Claimant's counsel that it had extended several job opportunities to Claimant, "considering his return to work by his attending physician, Dr. Robert A. Fleming, Jr." (EX-14).

Claimant stated that in March, 1988, he received a letter from Employer requesting that he report to the first aid station. Claimant went to the shipyard on March 16, 1988, as requested in the letter. (Tr. at 67). Claimant first saw Bill Koch, Employer's workers, compensation supervisor. Claimant stated that Mr. Koch informed him that his compensation had been terminated. (Tr. at 68). Claimant then returned to the first aid building and was shown into an examination room. When the doctor arrived,

Claimant informed him that his workers' compensation had been suspended. Claimant stated that the doctor refused to see him stating that he only saw people on workers' compensation. The doctor instructed Claimant to go home. (Tr. at 69).

Claimant came under the care and treatment of Dr. Robert Fleming. Claimant stated that he initially saw Dr. Fleming for a back problem he began suffering after the second time he attempted to return to work. Dr. Fleming has performed wrist and back surgeries on Claimant. Claimant's last back surgery was in February, 1989 and his last wrist surgery was on April 1, 1993.

Dr. Robert A. Fleming, Jr., a board certified orthopedic surgeon, testified that he is Claimant's treating orthopedist. His records indicated that he had been treating Claimant since 1984. He stated that Claimant's physical condition requires that he alternately sit, stand and lie down. (EX-18). He stated that Claimant could maintain each of these positions for approximately thirty minutes before becoming symptomatic and seeking another position. As for Claimant's wrist injuries, Dr. Fleming stated that Claimant could perform light duty activities; specifically, non-repetitive lifting of ten pounds with the left hand only but probably more with the aid of his right hand.

Dr. Fleming stated that Claimant would be restricted in fine manipulations with his left hand and he probably would be restricted somewhat with his right hand. (EX-18 at 12). Dr. Fleming specifically stated that Claimant could perform a job which permitted sitting and standing intermittently if it also afforded the ability to lie down. (EX-18

at 8). He additionally restricted Claimant from repetitively bending, squatting, stooping, and lifting due to his back, although he can do all of these activities occasionally. Dr. Fleming said Claimant is completely unable to climb ladders although he can climb stairs occasionally. He is able to reach above shoulder height only occasionally due to the degenerative changes in his shoulders which is not related to his wrist injury.

Claimant is capable of 10 to 20 pounds lifting occasionally with his left hand but 35 to 40 pounds with his back on an occasional basis. (EX-18 at 36). Dr. Fleming stated that Claimant would have been capable of all of these activities within eighteen months to two years of his final back surgery in February 1989. He added that with regard to his wrist, Claimant would be capable of light duty activity within six months of his final surgery on April 1, 1993.

Regarding Claimant's wrist, Dr. Fleming stated that since 1984, Claimant has gone through intervals of being capable of performing light duty, periods in between his surgeries and subsequent periods of recuperation. (EX-18 at 15). But Claimant's back would have required the outlined restrictions all along. In fact, he would be unable to do those activities until two years after his final surgery.

Dr. Fleming stated that he understood Avondale did not have a program which would allow Claimant to lie down intermittently, but he would be glad to review any information on such a program. (EX-18 at 18)

Dr. Fleming opined that Claimant reached maximum medical improvement with regard to his back two years

following his last surgery. He stated that Claimant reached MMI with regard to his wrist approximately six months following his last wrist surgery, which would be November 1, 1993, the date stipulated to by the parties. (JX-1, EX-18 at 19).

Dr. Fleming stated Claimant's back condition was the result of a degenerative problem made manifest by his injury. (EX-18 at 21). He explained that Claimant's injury was actually the limp Claimant suffered as a result of the nerve resection operation. Although he stated that the structural changes in Claimant's spine were not due to his limping, the limping caused the condition to become symptomatic. He stated Claimant had an inequality of leg length that may have played a part and that Claimant's limping for six months following the nerve resection probably played a part.

In May, 1987, Dr. Ray J. Haddad, an orthopedic surgeon, examined Claimant on a referral from Dr. Fleming. (EX-10). Based on examination and lab reports, Dr. Haddad concluded that Claimant had "no evidence of nerve root irritation either clinically or in his laboratory work." (EX-10 at 3). Dr. Haddad noted that Claimant's "basic problem appears to be in the area of the facets at L4-5."

Dr. Haddad's May 8, 1987, report noted that following Claimant's first bone graft to his wrist, "[h]e developed some sort of difficulty with his left hip after the bone graft which was removed from his first operation. This probably has nothing to do [with] the present problem he has." Apparently, Dr. Haddad examined Claimant

on only one occasion, however his September 8, 1987, report to Employer's counsel noted:

> In response to your inquiry concerning [Robert Bourgeois], it would be my opinion that this patient's injury to the lateral femoral cutaneous nerve had no involvement nor anything to do with him developing back pain. I do not think that the limping or the abnormal gait it may have caused him would have any adverse affect on him developing low back pain. (EX-10).

Dr. Donald C. Faust, a board certified orthopedic surgeon, examined Claimant on January 22, 1993, at Employer's request. (EX19). Dr. Faust reviewed some of Claimant's medical records, took a history from Claimant and performed an examination which he stated last approximately 45 minutes.

Dr. Faust stated Claimant was capable of light to medium duty work. With regard to his back, Dr. Faust limited Claimant's carrying to 10 to 20 pounds occasionally. With regard to his left wrist he felt Claimant could lift up to 75 pounds. He stated that Claimant should avoid squatting due to his back but that he could walk distances up to several blocks.

Dr. Faust stated that six months of limping would not cause the structural changes in Claimant's back. (EX-19 at 11). He stated however, that an individual with arthritic changes in their back who was subjected to six months of an abnormal gait may begin to experience back pain. (EX-19 at 36).

Nancy T. Favaloro, a vocational rehabilitation counselor, testified on behalf of Employer. Employer contacted

Ms. Favaloro in October, 1993 to evaluate Claimant. (Tr. at 107). Ms. Favaloro was unable to personally interview Claimant but stated that she read his June 12, 1985, and August 3, 1988 depositions. Additionally she reviewed the medical records from Drs. Faust, Haddad, Fleming and Kline, as well as medical records from various hospitals.

Ms. Favaloro conducted a labor market survey in December, 1993. (EX-14). Ms. Favaloro stated that she was familiar with Claimant's educational and work histories. Based on a review of Claimant's medical records, Ms. Favaloro testified that Claimant was capable of performing sedentary to light duty employment although he was restricted from climbing and lifting in excess of 20 pounds. Ms. Favaloro's December 7, 1993, report indicates that she used the work restrictions assigned by Dr. Faust in completing her survey. Consequently, Ms. Favaloro focused on alternative employment which would primarily be in an office or in a seated environment. (Tr. at 111).

Considering Claimant's age, education, work history, transferable skills and medical restrictions, Ms. Favaloro identified the following position as compatible with Claimant's capabilities:

> 1. *service advisor at auto dealership* – high school diploma required; basic mechanical knowledge and people skills helpful; alternate sitting, standing and walking; no heavy lifting or climbing; one position available at Baldwin Motors ($6.50 per hour); one position with Hood Chevrolet ($1200-1300 per month).

2. *weigh station monitor* – on the job training; complete paperwork and occasionally walk to scale area to check loads; Department of Weights and Standards ($6.70 per hour to start).

3. *lens technician* – on the job training to someone with manual dexterity; operates different machines to make eyeglass lenses; alternate sitting, standing and walking; lifting less than 20 pounds; Vision Plaza ($5.00 per hour).

4. *claims representative trainee* – three week program; write damage reports and complete paperwork; State Farm ($23,800 per year entry level).

5. *credit collection trainee* – contact delinquent accounts and attempt to secure payment; keep record of payments; high school diploma required; ($18,000-20,000 per year).

Ms. Favaloro testified that these positions are all located in the Hammond/North Shore area. Additionally, the following positions are located in the Greater New Orleans area:

1. *manager position* – supervisory experience required; oversees other employees and directs and evaluates leasing sales advertising and administrative procedures within company; alternate sitting, standing and walking; no lifting or climbing; Avis Rent-a-car ($19,000 per year).

2. *repair technician* – repairs power tools and small appliances and occasionally help out at front counter; inputs data into computer; alternate sitting, standing and walking; bench work

with lifting 20 pounds; Black and Decker ($6.50-$7.00 per hour) West Bank

(Tr. at 113, 116-118, EX-14).

Ms. Favaloro stated that all of the above listed employers were informed of Claimant's physical condition and work experience and all stated that they would accept an application from Claimant and consider him for the available position.

Ms. Favaloro stated that she was familiar with Employer's return to work program. She stated the program has bench type jobs which afford the workers the opportunity to alternately sit or stand, and even lie down if necessary. She stated that Employer's return to work program would provide jobs suitable for Claimant.

**Conclusions**

Average Weekly Wage

Claimant's first issue concerns whether his compensation rate should be based on his average weekly wage in 1973, at the time he suffered the original wrist fracture, or his wages at the time he actually suffered a disability as a result of that fracture in 1983. Although Employer had previously contended that Claimant should be compensated based on his wages at the time of injury in 1973, Employer conceded in its brief that Claimant's compensation should be based on his wages as of the date he suffered a disability in 1983.

As the parties do not dispute that Claimant's wages in 1983 should control his compensation rate and since I find those wages to be a fair reflection of Claimant's loss

of wage earning capacity, I conclude that Claimant's average weekly wage as of his disability in May, 1983, should be used to determine his compensation rate. *Johnson v. Director, OWCP,* 911 F.2d 247 (9th Cir. 1990), *cert. denied,* 111 S.Ct. 1582 (1991). *See also Merrill v. Todd Pacific Shipyards Corp.,* 25 BRBS 141 (1991).

Claimant contends that his average weekly wage at the time of his disability in March, 1983, was $664.78. (JX-1). Employer argues that Claimant's average weekly wage at the time of his disability was $523.39. (Employer's Brief at 6). However, neither party calculates Claimant's average weekly wage on the basis of Claimant's earnings for the 52 weeks prior to May 17, 1988, the date his disability began. Claimant used his wages from 1982 as a basis for his calculation, while Employer used only Claimant's earnings for the month of May, 1983 for its calculation.

Section 10 of the Act sets forth three alternative methods for determining the claimant's average annual earnings, which are then divided by 52 pursuant to § 10(d) to arrive at an average weekly wage. *Johnson v. Newport News Shipbuilding and Dry Dock Co.,* 25 BRBS 340 (1992); *Orkney v. General Dynamics Corp.,* 8 BRBS 543 (1978); *Barber v. Tri-State Terminals, Inc.,* 3 BRBS 244 (1976), *aff'd sub nom. Tri-State Terminals, Inc. v. Jesse,* 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

Claimant was a monthly salaried employee during the time he suffered the disability. His wage records reflect that beginning in December 1981 the earned $2912 per month. In June, 1982, Claimant's wages were decreased to $2766.00 per month. On March 4, 1983,

Claimant received a pay decrease to $2268.00 per month. (EX-16). Using these figures, and working backward from the date of disability on May 17, 1983, Claimant earnings were as follows:

| | | |
|---|---|---|
| 1/2 May, 1983 | $1134 | ($2268/2) |
| April, 1983 | 2268 | |
| March, 1983 | 2268 | |
| February, 1983 | 2766 | |
| January, 1983 | 2766 | |
| December, 1982 | 2766 | |
| November, 1982 | 2766 | |
| October, 1982 | 2766 | |
| September, 1982 | 2766 | |
| August, 1982 | 2766 | |
| July, 1982 | 2766 | |
| June, 1982 | 2766 | |
| 1/2 May, 1982 | 1456 | ($2912/2) |
| | $32,020 | |

Dividing the $32,020.00, which represents Claimant's average annual wage for the 52 weeks prior to his disability, by 52 in accordance with Section 10(d) to determine Claimant's average weekly wage results in a finding that Claimant's compensation rate should be based on an average weekly wage of $615.77.

Section 14(f) penalties

Claimant argues that Employer should be assessed a penalty pursuant to Section 14 (f), or in the alternative Section 14(e), based on Employer's "unilateral" termination of Claimant's compensation in March, 1988, and for paying Claimant at a compensation rate based on his 1973 wages.

Section 14(f) provides for a twenty percent penalty assessed against an employer "if any compensation, **payable under the terms of an award,** is not paid within 10 days after it becomes due." Section 14(e) provides for a ten percent penalty assessed against an employer, "if any installment of compensation payable without an award is not paid within fourteen days after it becomes due" unless the employer has filed a Notice of Controversion.

Claimant admits that there was no award in this case, but argues:

> Although there was not an award for compensation benefits, compensation was voluntarily paid at the improper rate from the date of disability, May 17, 1983, until it was arbitrarily terminated on March 15, 1988. The claimant would argue that the voluntary payment of compensation for this extended period of time would have the same effect as an award and a penalty should therefore be based on subsection (f). In the alternative, the claimant argues that the penalty should be based on Subsection (e). (Claimant's Brief at 17).

Claimant cites no authority for his proposition that a voluntary payment of compensation for an extended period of time should be given equal weight with an "award" as contemplated in Section 14(f), and I am unaware of any such authority. As there was no award in effect at the time Employer ceased making compensation benefits, I am unwilling to assess any penalty pursuant to Section 14(f).

Claimant summarily argues in the alternative that penalties should be assessed pursuant to Section 14(e).

However, Employer filed its Notice of Controversion on March 11, 1988.[4] Since Employer filed its Notice of Controversion on March 11, 1988, and made its last payment subsequently on March 16, 1988, I can determine no basis for assessing penalties pursuant to Section 14(e).

Employer's Credit

Claimant contends that Employer is not entitled to a credit for the full amount of Claimant, recovery from his third party judgment. Claimant argues that Employer is entitled to a credit on his principle recovery but not that part of his recovery that is attributable to the legal interest which accrued on that principle. Employer argues that Section 33(f) provides that an employer is entitled to a credit equal to a claimant's "net" recovery from a third party law suit.

Section 33(f) provides:

> If the person entitled to compensation institutes proceedings within the period prescribed in section 33(b), the employer shall be required to pay as compensation under this Act a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the *net* amount recovered against such third person. *Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to*

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[4] The parties stipulated that Employer's Notice of Controversion was filed on February 9, 1988. However, Employer's Exhibit No. 12 contains a file copy of Employer's Notice of Controversion dated March 11, 1988.

*such proceedings (including reasonable attorney's fees).*

Claimant has cited no authority for the proposition that the "net" recovery referred to in Section 33(f) is an amount excluding anything but "the expenses reasonably incurred by such person in respect to such proceedings (including attorney's fees)." The Fifth Circuit Court of Appeals has repeatedly held that Claimant's "net recovery" means just that – all money recovered minus costs and attorney's fees. *Jacques v. Kalmar Industries, AB*, 8 F.3d 272 (5th Cir. 1993)(punitive damages included in net recovery); *Hayden v. Kerr-McGee*, 787 F.2d 1000 (5th Cir. 1986)(reimbursement to carrier dependant on employee's total award, not on percentage of actual loss); *Haynes v. Rederi A/S Aladdin*, 362 F.2d 345 (5th Cir. 1966), *cert. denied*, 385 U.S. 1020 (1967) (employer entitled to reimbursement including recovery for pain and suffering). The *Jacques* court noted that "the organizing principle of these decisions has been that the insurer shall recover in *full* its payments from the *total* recovery obtained by the injured workman from a third party defendant, regardless of what that recovery replaces or is termed by the court." Consequently, I cannot find that Claimant's net recovery is anything less than the $533,051.00 that he recovered and thus, that is the credit to which Employer is entitled.

In addition to his argument on legal interest, the Claimant also raises several other issues regarding the amount of Employer's credit and other variables which would "chip away" at that amount. Specifically, Claimant contends that his rate of compensation rate should be higher than that paid by the Employer, and as discussed

above, I agree with Claimant and Employer's credit should be reduced accordingly.

Claimant also contends that his compensation should have been increased annually beginning in 1984 when payments commenced in accordance with Section 10(f) which provides for a yearly cost of living adjustment (COLA). However, COLA increases only apply to permanent total disability payments. *Phillips v. Marine Concrete Structure, Inc.*, 877 F.2d 1231 (5th Cir. 1989). Thus, Claimant would not be entitled to a cost of living adjustment at least until he had reached maximum medical improvement and was receiving permanent disability compensation. Dr. Fleming stated, and the parties agreed, that Claimant reached maximum medical improvement in November, 1993, six months after his final wrist surgery. Consequently, no cost of living adjustment would be applicable until after that time and only if Claimant were found to be permanently totally disabled.

In addition, Claimant argues that Employer's credit should be reduced by the amount of medical expenses either paid by Claimant or on Claimant's behalf. The only compelling evidence in the record of medical expenses is a November 12, 1991, Consent Judgment entered into by Claimant and The Louisiana Patient's Compensation Fund. The Consent Judgment for medical expenses totalling. $25,882.89 was said to reimburse Claimant for medical expenses incurred through May 7, 1991. Further, the Consent Judgment provided that The Louisiana Patient's Compensation Fund make payments to Claimant from "time to time according to the terms of [Louisiana Revised Statute 40:1299.43] for all medical care and

related benefits that he might incur after May 7, 1991." (CX-24).

Since payment of Claimant's medical expenses were provided for in this way, those amounts are actually part of Claimant's third party recovery, and as such, includable in Employer's credit. As any future amounts would be simultaneously added to Employer's credit and subtracted from such credit for amounts it would otherwise owe Claimant, these figures cancel each other out and do not otherwise effect Employer's remaining credit.

Section 26 Costs

Employer has asked that costs be assessed against Claimant for what it perceives is a frivolous claim with no basis in law or fact. The test to determine whether costs are assessed against Claimant is whether Claimant had some reasonable likelihood of prevailing in his claim. *Bolden v. U.S. Stevedores Corp.*, 18 BRBS 172 (1985). Since, Claimant has succeeded in establishing that the proper compensation rate should be based on his 1983 wages rather than his wages in 1973, a position which Employer had disputed up through the time of the formal hearing, I find that costs shall not be awarded against Claimant.

Employer's Position

At the hearing, Employer contended that Claimant is not totally disabled; that his present disability is due to a back condition which is not related to his wrist surgery and subsequent femoral cutaneous nerve damage and thus, not related to his employment; that he is capable of

performing light sedentary work earning a wage between $5.00 per hour and $23,800 per year; and that he is not entitled to benefits under the Act.

Based upon a discussion held at the end of the hearing, however, at which time Employer agreed that if I rendered findings as to its credit and Claimant's proper compensation rate I need not go any further, I accept Employer's counsel at his word and stop my investigation here.[5] However, nothing in this decision shall be construed as having foreclosed Employer's right to litigate these matters at a later time.

## Conclusion

Based upon the foregoing findings of fact, conclusions of law, and the entire record, I hereby enter the following compensation order. The specific dollar computations shall be administratively performed by the District Director.

## ORDER

It is hereby ORDERED that:

1. For purposes of Section 33 under the Act, Claimant's net third party recovery from his medical malpractice claim against Dr. Gordon McFarland *et al.* was in the amount of $533,051.00;

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[5] At page 183 of the transcript Employer's counsel was asked if I found Claimant entitled to the higher compensation rate but Employer entitled to the full credit. " . . . I could stop at that point? Note the remaining issues but say they have been mooted by that decision?" Employer's counsel replied, "Right."

2. Claimant's average weekly wage at the time of his disability was $614.37;

3. Counsel for Claimant, within 20 days of receipt of this ORDER, shall submit a fully supported fee application, a copy of which must be sent to opposing counsel who shall then have 10 days to respond with objections thereto. See 20 C.F.R. § 702.132; and

4. All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

Entered this 7th day of April, 1994, at Metairie, Louisiana.

/s/ C. Richard Avery
C. RICHARD AVERY
Administrative Law Judge

CRA:kr

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-60608

ROBERT A. BOURGEOIS
Petitioner

v.

AVONDALE SHIPYARD, INC.; DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR

Respondents

Petition for Review of an Order of
the Benefits Review Board

**ON PETITION FOR REHEARING**

(Filed Nov. 25, 1997)

Before REYNALDO G. GARZA, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

/s/ Reynaldo G. Garza
United States Circuit Judge

**U.S. Department of Labor** **[seal]**

**Benefits Review Board**
**800 K Street N.W.**
**Washington, D.C. 20001-8001**

**Re: Robert A. Bourgeois v. Avondale Shipyards, Inc., Director, Office of Workers' Compensation Programs (Case No. 93-LHCA-0920) (OWCP No. 07-0024532) (BRB No. 94-2462)**

## NOTICE FROM THE CLERK OF THE BENEFITS REVIEW BOARD

Pursuant to the provisions of Public Law 104-134 (Omnibus Appropriations for Fiscal Year 1996), enacted on April 26, 1996, appeals from decisions under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901, *et seq.*, which have been pending before the Benefits Review Board for more than one year, shall, if not acted upon before September 12, 1996, be considered affirmed by the Board and shall be considered the final order of the Board for purposes of obtaining a review in the United States courts of appeal.

According to our records, the appeal in the instant case has now been pending at the Benefits Review Board for more than one year. Therefore, consistent with Public Law 104-134, this decision pending review by the Benefits Review Board is considered affirmed and shall be considered the final order of the Board for purposes of obtaining review in the United States courts of appeal. Attached please find an outline of the procedures for appealing to the courts of appeal.

DATE: Sep. 12, 1996

Sincerely,

/s/ Thomas O. Shepherd, Jr./P.F.

Thomas O. Shepherd, Jr.
Clerk of the Board

**Robert Andrew BOURGEOIS, Sr.**

**v.**

**OCHSNER FOUNDATION HOSPITAL AND CLINIC and Dr. Gordon McFarland.**

**No. 89-CA-164.**

Court of Appeal of Louisiana
Fifth Circuit.

Sept. 14, 1989.

Rehearing Denied Nov. 17, 1989.

Writs Denied Jan. 26, 1990.

Iddo Pittman, Jr., Hammond, for plaintiff/appellant.

Henry B. Alsobrook, Jr., Joseph P. Gordon, Adams and Reese, New Orleans, for defendants/appellees.

Before KLIEBERT and GOTHARD, JJ., and M. JOSEPH TIEMANN, J. pro tem.

GOTHARD, Judge.

This appeal is from a judgment in favor of the defendant physician in a medical malpractice suit.

Robert A. Bourgeois received a bone graft to his left wrist in surgery performed at Ochsner Foundation Hospital by Dr. Gordon McFarland, an orthopedist specializing in hand surgery, on May 17, 1983. The graft required harvesting bone from the iliac crest of the left hip, in the course of which the lateral femoral cutaneous nerve was injured, causing pain and numbness in Bourgeois' left lateral thigh. A second surgery was performed on January 11, 1984 by Dr. David Kline, a neurosurgeon, to

relieve the pain by severing the previously injured nerve. The numbness is apparently permanent.

While under Dr. Kline's care Bourgeois began to complain of low back pain. As the back pain continued and limited motion and discomfort in the left wrist had not disappeared, in October, 1984 Bourgeois consulted a new orthopedic surgeon, Dr. Robert Fleming. Dr. Fleming determined that the bone graft had not taken and performed a second graft successfully at West Jefferson Hospital on October 25, 1984.[1] Dr. Fleming used conservative treatment on the back until it was apparent that surgery was needed and then, on June 9, 1988, performed a lumbar fusion. Bourgeois had held a responsible job as captain of a crane vessel at Avondale. He returned to work briefly in 1984 after the second surgery but was unable to perform the physical activity the position entailed, and has not been employed since that time.

Bourgeois submitted a claim under the Medical Malpractice Act, LSA-R.S. 40:1299.41 et seq., alleging negligence of Dr. McFarland in allowing a gouge to slip into the soft tissue surrounding the hip, injuring the lateral femoral cutaneous nerve, and negligence in treating him after the surgery. After a medical review panel decided adversely to Bourgeois, on November 27, 1985, he filed suit against McFarland and Ochsner.[2] A jury trial was held September 12 through 15, 1988. The court dismissed

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[1] Dr. Fleming explained that some patients "reject their own bone graft," and plaintiff alleges no malpractice on that part of the surgery.

[2] Avondale intervened in the suit, seeking reimbursement of its medical and worker's compensation payments.

Ochsner Clinic and Hospital from the suit on a directed verdict at the close of the plaintiff's case. The jury found in favor of Dr. McFarland and this appeal followed.

The plaintiff raises the following issues: 1) whether Dr. McFarland was negligent, amounting to malpractice, in letting the gouge slip into the soft tissue; and 2) whether the surgeon was negligent in his treatment following the operation.

Bourgeois also assigned seven errors, five of which relate to the conduct of the trial: that the trial court was in error 1) in excluding the entire deposition of Dr. McFarland taken on June 19, 1985; 2) in permitting defendants' counsel to edit out portions of Dr. J. Ollie Edmunds' deposition; 3) in permitting the questioning of each member of the Medical Review Panel concerning the panel's finding, his oath and other matters relating to the medical review; 4) in permitting the introduction of the video deposition of Dr. Frank O. Petkovich; and 5) in its charge to the jury. Assignment of error (6) was the judge's sustaining Ochsner Foundation Hospital and Clinic's motion for a directed verdict. The seventh is the jury's returning a verdict in favor of the defendant.

The law regarding medical malpractice claims against a specialist is summarized in *Douzart v. Jones*, 528 So.2d 602, 603 (La.App. 2nd Cir.1988), as follows:

> In a medical malpractice action against a physician-specialist, the plaintiff has the burden of proving the degree of care ordinarily practiced by physicians within the involved medical specialty and is not restricted to proof of the standards of care and skill within the defendant's community or locality. LRS 9:2794A(1);

*Ardoin v. Hartford Acc. & Indem. Co.*, 360 So.2d 1331 (La.1978).

> The plaintiff must also prove that the defendant either lacked the expected degree of knowledge and skill or failed to use reasonable care and diligence and his or her best professional judgment, in the particular application of that skill in the undertaking. Plaintiff must prove, as well, that the injury complained of was the proximate result of the defendant's breach of the professional duty. LRS 9:2794A(2), (3).
>
> The doctor's conduct is evaluated in terms of reasonableness under the circumstances existing when the professional judgment is exercised. Neither a general practitioner nor a specialist is held to a standard of perfection or evaluated with the benefit of hindsight. See and compare *Matthews v. La. State Univ. Medical Center*, 467 So.2d 1238 (La.App. 2d Cir.1985).

See also the Supreme Court's extensive consideration of the physician's duty of care in *Pitre v. Opelousas General Hosp.*, 530 So.2d 1151 (La.1988).

NEGLIGENCE IN SURGERY

The harvesting procedure, in brief, entails finding the iliac crest or top of the pelvic bone, then making an incision into the skin and underlying tissue to expose the bone. The muscles and tendons are then peeled away from the iliac crest and held by self-retaining or assistant-held retractors. The surgeon then extracts the needed bony material with a gouge, which is a type of bone knife

similar to a carpenter's chisel, which he taps with a mallet.

The plaintiff alleges that Dr. McFarland caused damage to his femoral cutaneous nerve by letting an instrument slip into the soft tissue, partially severing the nerve. Dr. McFarland admitted that the gouge slipped when he was preparing to extract some bone for a plug to be inserted in the wrist. He testified he had made a two-inch incision at the iliac crest. The patient was overweight, and the hole was about two inches deep. Dr. McFarland continued to describe the surgery as follows:

> [Y]ou have belly muscles called inferior oblique, that generally roll over. Except in very thin people, that has to be pulled out of the way, not necessarily cut out of the way.
>
> Then you make an incision on the bone, on the surface of the bone, right down on it, and start peeling off the tendons and muscles until you retract it from the side; and you pack it away and put retractors in to hold it, stretched out of the way so that it doesn't keep draping back over the surface you are operating on.

He continued, demonstrating with instruments on a skeleton:

> . . . [W]e had a relatively short incision and a deep hole – he was fat – with self-retaining retractors holding the wound apart and holding the muscle apart, pulled away from the bone. And the problem was, working from a distance, with a soft bed of giggely fat, to hold the gouge very firmly and steadily on the crest of the ilium. . . .

> Anyway, the hand is high, resting on the belly fat or the skin and the belly, and pressing very hard on this crest. Now this crest is curved slightly, but definitely curved. So you are pressing hard, and as I hit it with the mallet to start it . . . it bounced and went like that. It was my fingers that pushed it into the tissues, not the hammer; so it went like this. And it could not have gone any further than where I was holding it.

He stated further that he was exercising more care than usual because he was holding the gouge firmly on the iliac crest to prevent its shifting.

Dr. McFarland admitted that in his 1985 deposition he had said that Bourgeois had discomfort and numbness in the leg "as soon as he awakened." However, after reading the plaintiff's and Mrs. Bourgeois' testimony, he felt he had made the statement in error, as they testified that the extreme pain began the day he returned home. His assistant, Dr. Lessenberry, saw Bourgeois five days after surgery because of his complaints of pain and noted in his report that he suspected a neuropraxia or an irritation of the left femoral cutaneous nerve, with severe pain that was worsening. That nerve, a sensory nerve, runs on the inside of the pelvis within a muscle, thence into the thigh.

Dr. McFarland saw his patient on June 6, 1983 and noted:

> I'm sure at the time of bone graft harvest, the lateral femoral cutaneous nerve was damaged. It was not seen at surgery. I know of nothing to do now except wait for a recovery.

He testified that the gouge had slipped off in an area where the lateral femoral cutaneous nerve was located. He admitted having said in the deposition that he thought the nerve was "severed some", that is, that it was partly intact or else Bourgeois would not have had the pain. He testified at trial that after seeing Dr. Kline's histologic report, showing no evidence of a focal injury, that he realized the slip had nothing to do with the problem. He suspected retraction had caused a hematoma, which grew, causing the nerve to stretch and the pain to become worse.

Dr. McFarland admitted that he had not noted the gouge's slip in the surgery report (dictated by Dr. Lessenberry but approved by himself). He stated that he had not mentioned it because he did not think it had caused any problem; the incident was not reported anywhere in the hospital record.

Dr. Kline's subsequent surgery consisted of locating the lateral femoral cutaneous nerve, removing several sections of it and then coagulating the ends of the remaining nerve with hipolar forceps to prevent regrowth. He found "an area that was discolored, more narrow than the rest of the nerve and slightly firmer than the rest of the nerve." He concluded that "something had happened to the nerve at that point." He studied sections of the nerve in his own laboratory at L.S.U. School of Medicine and found:

> . . . [B]asically what they showed was a nerve that had degenerative change in it but then also regenerative change. In other words, some type of injury had occurred to it, and it was trying to correct itself. So the fibers were

> smaller than they should have been, the myelin or the covering and the insulation on them was poor.

He stated it was possible that the nerve had been stretched:

> Most likely, because the histologic picture was most compatible with that, as was what I found at the operating table. Either an area of contusion over about a length of an inch, which is like a bruising or a stretching over that length, because of that area of slight narrowing, discoloration, and slight firmness, because the histologic picture sort of fits with that. Because you think of a contusion, and there is some stretch with that or pulling on it can do it. You can't separate those out by looking at the nerve histologically.

He was not asked whether it could have been struck with an instrument. However, Dr. Fleming, who later performed a spinal fusion on Bourgeois, testified that a contusion could be produced by a direct blow from an instrument:

> Q. . . . If the nerve, if you found something such as the lateral cutaneous nerve – and I know you are not a neurosurgeon or a neurologist – but if you were looking at that nerve and you found that it was somewhat flattened; it was slightly firmer and maybe discolored to some degree, would you feel that it had been injured by some sort of trauma, such as a laceration?
>
> A. I would have said it would have been injured by some sort of trauma. Insofar as to say, if it had been, in my opinion,

involved as a result of a laceration, I would expect to see a swelling of the nerve or a so-called neuroma. If it – but in answer to your question, I would say it could be as a result of trauma but not –

Q. How about a bruise?

A. Bruise? A stretch injury is a bruise. When I say stretch as a result of retraction, I am speaking, that contuses a nerve, yes.

Q. If it was struck by an instrument, say during an operation, but not cut, but contused, could that cause that?

A. Yes, sir.

The plaintiff's expert witness, Dr. Lee C. Detenbeck, a board certified orthopedic surgeon, testified by deposition. He opined that the nerve could have been partially cut and healed with scar tissue, as a result of a blow or pressure from retractors holding the tissue away from the bone.

The three members of the Board of Review Panel, all orthopedic surgeons with a subspecialty of hand surgery, Dr. Robert Chuinard, Dr. Harold Stokes, and Dr. J. Ollie Edmunds, testified by deposition for the defense. They had not known of the gouge's slip when the review board panel convened. Dr. Chuinard testified he believed the probable cause of the nerve damage was stretching and contusion in the process of retracting the muscles; he felt it would be nearly impossible to strike the nerve directly because of its location. Dr. Edmunds stated that in the cases he knew of where there were complaints related to the lateral femoral cutaneous nerve he presumed the

problem was related to a stretch or swelling or hematoma, *"or it could have been related to direct injury by some instrument, perhaps an osteome."* [Emphasis supplied.] After reviewing the records in Bourgeois' case, he had not reached an opinion as to what caused the injury to the nerve. Dr. Stokes said that he could not say with any degree of certainty what caused the injury but could rule out some possibilities, including direct injury to the nerve. He stated:

> If that had been the case, the patient would not have had a free period before the onset of his symptoms. I think he would have awakened with symptoms. I believe that – and therefore, I don't think the nerve was cut. . . .

The plaintiff alleges that Dr. McFarland failed to exercise the skill of a physician practicing the specialty of orthopedic surgery by making too small an incision, only two inches,[3] in an obese man. Assuming that the damage was due to the knife's slipping, the appellant's counsel asserts that good operative procedure would require a much longer incision for the surgeon to have a clear view of the operative field. Each expert estimated the length of incision in his own practice to be longer than two inches when the patient was a large heavy man. Dr. Fleming testified he would use an incision as long as three inches. Other estimates were three to four inches by Dr. Hugh Tullos of Baylor Medical School and Dr. Roy Haddad of

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[3] The defendants point out that the incision was described as four inches long in the operating report. Dr. Kline's testimony clearly indicates the old scar was two inches when he performed the extirpation of the nerve; consequently, we conclude the operating report is in error on this detail.

Tulane Medical School, to a limit of six inches by Doctors Stokes, Edmunds, and Chuinard.

A further allegation of deviation from the standard of care is Dr. McFarland's delayed referral to a neurosurgeon, while relying on conservative treatment, and allowing his patient to remain in pain over a period of months following the surgery. The operation took place on May 16, 1983, while Dr. Kline's surgery on the cutaneous nerve relieved his pain almost eight months later, on January 11, 1984. Almost five months elapsed between the first surgery and the first referral for consultation with a neurologist on October 6, 1983. Except for a few weeks of relief from nerve blocks in July, Bourgeois experienced extreme pain in his left leg. He favored the left leg in walking, limped, and began having low back pain, which ultimately resulted in a spinal fusion. While clearly the damage to the femoral cutaneous nerve did not cause the back problem, both Dr. Kline and Dr. Fleming testified that the limp probably made preexisting arthritic changes in the facet joints of the spine symptomatic.

While the physician witnesses testified that nerve injuries smiliar to Bourgeois' normally resolved on their own, and aggressive treatment was rarely indicated, two of the defendants' witnesses testified that they would have an earlier consultation. Dr. Chuinard testified that, in similar circumstances and depending on the severity of the complaints, he would ask for a second opinion as early as a week after the surgery and no later than six months. Dr. Stokes would make a referral in from six to sixteen weeks.

The defendants urge that damage to the lateral femoral cutaneous nerve is a recognized complication of bone harvesting for use in a graft. However, when the witnesses were questioned as to its frequency, it became apparent that injuries producing symptoms as severe as Bourgeois' are very rare. Dr. Tullos testified that he had not ever damaged that nerve in more than one hundred surgeries. Dr. Chuinard estimated that he had done more than 500 procedures, had had two patients who experienced a similar nerve problem, but those recovered without surgery. Dr. Haddad, with 500 to 1000 surgeries, had not had a case. Dr. Fleming had resected the lateral femoral nerve of two patients, apparently neither damaged by his own previous surgery, in twenty years of practice. Dr. Edmunds' only case, in 1000 surgeries, occurred in surgery on a fractured pelvis and hip. Dr. Stokes had had patients with injuries to the femoral cutaneous nerve but none required extirpation of the nerve. We can only conclude that the injury that befell Bourgeois is not a common complication of surgery, such as bleeding or infection, and does not occur in the absence of deviation from the standard of care.

The appellant assigned as error the court's allowing the videotaped deposition of Dr. Frank O. Petkovich to be introduced at trial over objection of plaintiff's counsel. Trial was set for Monday, September 12. Notice of the video deposition to be taken in St. Louis, Missouri at 1:30 p.m. on Friday, September 9, was handed to appellant's counsel on the afternoon of September 8, less than twenty-four hours before. La.C.C.P. art. 1438 provides that, "A party desiring to take the deposition of any person upon oral examination shall give *reasonable* notice

in writing to every other party to the action. . . . " In the recent case of *Heaton v. Gulf Intern. Marine, Inc.*, 536 So.2d 622 (La.App. 1st Cir.1988), four days' notice to a Houma resident of a deposition to be held in New Orleans was held not to be reasonable. In the case before us, the trial judge overruled the objection, stating that a motion to suppress should have been filed prior to the deposition. Article 1453 provides that "all errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice." Counsel objected orally to the defendants upon receipt of the notice and later filed a written motion to suppress, dated September 9 but marked by the clerk of court as filed September 15. The testimony was damaging to the plaintiff as he was not able to interrogate the witness. We find that the ruling was an abuse of the court's discretion, inasmuch as the defendants failed to comply with the mandate of article 1438 to provide reasonable notice. Consequently, we have excluded the deposition testimony of Dr. Petkovich from our review of this case.

Mindful that a jury's finding of fact will not be disturbed unless it is clearly wrong, we have concluded that the jury in this case was in error in determining that Dr. McFarland did not fail to meet the standard of care for orthopedic surgeons. We find that Robert Bourgeois carried his burden of proving that Dr. McFarland's deviation from the standard in performing the surgery caused the damage to the lateral femoral cutaneous nerve and that the plaintiff's limping to avoid putting weight on the affected leg caused latent back problems to become

symptomatic. In the recent case of *Howell v. Iacona*, 505 So.2d 821 (La.App. 2nd Cir.1987), the court said, at 823:

> We recognize that medicine is an inexact science at best, but in the courts of law we must be concerned not with concrete and irrefutable truths, but rather the proper distribution of liability, based on the preponderance of the evidence. The plaintiff's burden is not that he prove his case beyond all doubt, or even beyond a reasonable doubt, but merely by a preponderance of the evidence. A showing that his position is 51% likely is acceptable. He need not negate all viable theories, but only show that his position is more probable than not. *Baker v. Beebe*, 367 So.2d 102 (La.App. 4th Cir. 1979), writ. denied, 368 So.2d 135 (La.1979).

We base our determination on the totality of circumstances. The gouge slipped off the bone into surrounding tissue. According to a number of experts, the description of the extirpated nerve section fit several possibilities: a hematoma, a stretch injury from retraction, and a contusion. A contusion can result from the direct blow of an instrument. No witness was willing to say with certainty what caused the problem. Several physicians testified that in performing surgery on a man of Bourgeois' build they would make a wider incision to better expose the bone. Their opinions lead us to conclude that more probably than not Dr. McFarland's deviation from the standard of care in making too small an incision made the surgery more difficult, causing the gouge to slip, and that the gouge struck the nerve and damaged it. We also find that the physician compounded the problem by failing to refer his patient promptly to a neurologist or neurosurgeon;

the plaintiff's months of favoring the affected leg made a back problem symptomatic. Finally, we find that, although damage to the lateral femoral cutaneous nerve is a known complication of bone harvesting, it is exceedingly rare.

We have reviewed the appellant's remaining assignments of error in the judge's rulings at trial.

*Deposition of Dr. McFarland.* The appellant asserts his case was prejudiced by the court's failure to admit the complete deposition into evidence. While the deposition of a party is admissible under La.C.C.P. art. 1450(A)(3), the plaintiff's case was not prejudiced, as the conflicting prior testimony was brought out in his examination of Dr. McFarland at trial. As he did not proffer the deposition, the court's ruling was not in error. *Verrett v. Preston*, 374 So.2d 121 (La.App. 1st Cir.1979).

*Deposition of Dr. J. Ollie Edmunds.* Counsel for the defendants conducted a video deposition of Dr. Edmunds, a member of the review panel, and introduced it into evidence in lieu of his appearance at trial. The tape was played at trial, but when the plaintiff's redirect was reached the defendants' counsel moved to waive the remainder of the deposition. Counsel for the plaintiff objected but the judge overruled. La.C.C.P. art. 1450(A)(4) provides:

> (4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which, in fairness, should be considered with the part introduced, and any party may introduce any other parts.

The trial judge's ruling in this matter was erroneous. Our review of the transcript, however, indicates that it contained no material that would have benefited the plaintiff; therefore, this was harmless error.

*Testimony of members of Medical Review Panel.* The appellant complains that his case was prejudiced by the defendants' improper questioning of the three members of the review panel, Dr. Harold M. Stokes, Dr. Robert G. Chuinard, and Dr. J. Ollie Edmunds. Each member was asked to read the one-sentence opinion of the panel and the oath, to identify his signature and to state whether he followed the oath in reaching his decision. LSA-R.S. 40:1299.47(H) provides, in pertinent part:

> Any report of the expert opinion reached by the medical review panel shall be admissible as evidence in any action subsequently brought by the claimant in a court of law, but such expert opinion shall not be conclusive and either party shall have the right to call, at his cost, any member of the medical review panel as a witness. If called, the witness shall be required to appear and testify. . . .

While the defendants' tactic no doubt overemphasized the report of the review panel to the jury, they were entitled to call and question the members.

*Jury Charges.* The appellant stated his objections to eight of the jury instructions. Number 11, to which he objected most strenously reads as follows:

> The State of Louisiana requires in this case that a Medical Review Panel hear some of the same evidence which you have just listened to. A

> Medical Review Panel consists of three physicians, usually in the same specialty as the defendant/physician. The way it works is like this: The plaintiff chooses a physician and the defendant chooses a physician. These two physicians jointly choose another physician. The three panelists are required to take a solemn oath just as you, the jury, did that they will faithfully perform their duties without favoritism or partiality. Then, the Panel reads all of the medical records and, based on their own experience and knowledge in the area, renders its decision. In this instance, the Panel determined that Mr. McFarland had not violated the applicable standards of care. The decision of the Medical Review Panel is not conclusive.

This instruction was superfluous and overemphasized the importance of the finding of the medical review panel to the detriment of the plaintiff.

*Directed Verdict for Ochsner Hospital and Clinic.*

Other than a brief statement that under the doctrine of respondeat superior Dr. McFarland's alleged acts of negligence are imputed to Ochsner, counsel for the appellant does not brief this assignment of error. No evidence suggesting personnel of the hospital were negligent was presented at trial. Accordingly, we find this assignment of error is without merit.

*Damages*

The plaintiff's expert, Dr. George R. Rice, professor of economics at LSU testified as to Bourgeois' lost past income and loss of future wages. He arrived at a figure of $491,214. No rebutting evidence was produced by the

defense. There is a joint stipulation by the parties that Avondale has paid $58,027.43 in medical expenses and $34,047.84 in compensation.

The medical malpractice act sets a recovery limit of $500,000 for all claims as follows, in pertinent part:

> R.S. 1299.42 B. (1) The total amount recoverable for all malpractice claims for injuries to or death of a patient, exclusive of future medical care and related benefits as provided in R.S. 40:1299.43, shall not exceed five hundred thousand dollars plus interest and cost.
>
> R.S. 40:1299.43 A. (1) In all malpractice claims filed with the commissioner of insurance which proceed to trial, the jury shall be given a special interrogatory asking if the patient is in need of future medical care and related benefits and the amount thereof.

"Future medical care and related benefits" has been construed to mean *all reasonable medical expenses incurred from the date of the alleged malpractice. LaMark v. NME Hospitals, Inc.*, 522 So.2d 634 (La.App. 4th Cir.1988), writ. denied, 526 So.2d 803 (La.1988).

As the jury found in favor of the defendant, we assume that it did not respond to an interrogatory regarding future medical care, as set out in R.S. 40:1299.43(A)(1). In Dr. Fleming's testimony, he stated that Bourgeois was still under his care, wearing a back brace, and that it would be one and one- half to two years before Bourgeois could return to light duty. The wrist had been X-rayed recently and appeared to be healing well; we would assume Bourgeois must be examined periodically.

For the reasons assigned above, the case appealed from is affirmed insofar as it dismisses plaintiff's claim against Ochsner Clinic and Ochsner Foundation Hospital; it is reversed and set aside insofar as it found that Dr. Gordon B. McFarland, Jr. did not deviate from the standard of care for orthopedic surgeons.

The appellate court is empowered to fix damages under its authority to review facts. *Rodriguez v. Traylor,* 481 So.2d 1017 (La.1986). Accordingly, we render judgment in favor of the plaintiff, Robert A. Brougeois [sic], Sr. and against Dr. Gordon B. McFarland in the maximum amount of $500,000, subject to a limit of professional liability of $100,000,[4] and representing $491,214 in lost past and future wages, subject to reimbursement of $34,047.84 to Avondale, and the remainder of $8,786 for pain and suffering; we further award medical expenses,[5] beginning with the date of malpractice, May 17, 1983, until date of judgment, September 26, 1988, subject to reimbursement to Avondale, plus future medical

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[4] LSA 40:1299.42 provides, in pertinent part:

> B.(2) A health care provider qualified under this Part is not liable for an amount in excess of one hundred thousand dollars for all malpractice claims because of injuries to or death of any one patient.
>
> (3)(a) Any amount due from a judgment or settlement or from a final award in an arbitration proceeding which is in excess of the total liability of all health care providers, as provided in Paragraph (2) of this Subsection, shall be paid from the patient's compensation fund pursuant to the provisions of R.S. 40:1299.44(C).

[5] *Prince A. Williams v. Jack Kushner, et al.,* 549 So.2d 294 (La.1989); *LaMark v. NME Hospitals, Inc.,* supra.

expenses of $10,000; we further award interest on the judgment from date of judicial demand, all costs of these proceedings and those below, plus fees of expert witnesses who testified for plaintiff. We remand for the limited purpose of determining amounts due for medical expenses to the plaintiff and to Avondale.

AFFIRMED IN PART, REVERSED IN PART, AND RENDERED.